Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

COASTAL SALVADORAN POWER LTD., COASTAL NEJAPA LTD., EL PASO CGP CO., SUCCESSOR IN INTEREST TO COASTAL STATES GAS CORP. AND THE COASTAL CORP., AND EL PASO CORP., SUCCESSOR IN INTEREST TO COASTAL STATES GAS CORP. AND THE COASTAL CORP.,

Petitioners,

v.

CRYSTAL POWER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Fifth Circuit wrongly construe 9 U.S.C. § 205 by holding that 28 U.S.C. § 1447(d) bars appeals from remand orders of causes removed under the statute implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

2. Must the procedural bar of unreviewability of remand orders fall in the face of the United States' treaty obligations to 135 other nations? *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) ("concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context")?

3. Did the Fifth Circuit erroneously refuse to review a remand order which either satisfies the collateral order doctrine or is reviewable because it was based on a non-§ 1447(c) ground in conflict with this Court's precedent?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below are:

Crystal Power Company (plaintiff/appellee/ respondent);

Coastal Salvadoran Power, Ltd., Coastal Nejapa, Ltd., El Paso CGP Co., successor in interest to Coastal States Gas Corporation and The Coastal Corporation, and **El Paso Corp.**, successor in interest to Coastal States Gas Corporation and The Coastal Corporation (defendants/ appellants/ petitioners).

CORPORATE DISCLOSURE STATEMENT

Coastal Salvadoran Power, Ltd. and Coastal Nejapa, Ltd. are Cayman Islands companies.

El Paso CGP Company, successor in interest to Coastal States Gas Corporation and The Coastal Corporation, and El Paso Corporation, successor in interest to Coastal States Gas Corporation and The Coastal Corporation, are Delaware corporations.

El Paso Corporation is the ultimate parent company of Coastal Salvadoran Power, Ltd., Coastal Nejapa Ltd., and El Paso CGP Company. Two publicly held companies own more than 10% of El Paso Corporation's stock. They are Pacific Financial Research and Brandes Investment Partners L.P.

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Coastal Salvadoran Power, Ltd. ("Coastal Salvadoran"), and Coastal Nejapa, Ltd. ("Coastal Nejapa"), Cayman Islands companies, El Paso CGP Company, successor in interest to Coastal States Gas Corporation and The Coastal Corporation, and El Paso Corporation, successor in interest to Coastal States Gas Corporation and The Coastal Corporation, file this petition for writ of certiorari to review decisions of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Pursuant to Supreme Court Rule 12(4), this single petition is being filed in connection with two separate orders issued by the Fifth Circuit dismissing two appeals of remand orders in a case removed twice under Section 205 of Chapter 2 of the Federal Arbitration Act.

The district court's orders of remand and memorandum opinions were unpublished. The district court's first remand order was entered in Civil Action No. H-03-3634; *Crystal Power Company v. Coastal Salvadoran Power Ltd.*; in the United States District for the Southern District of Texas, Houston Division. *See* App. B. The Court of Appeals order dismissing the appeal for lack of jurisdiction is unpublished. *See* App. A. The district court's second order of remand was entered in Civil Action No. H-04-1250; *Crystal Power Company v. Coastal Salvadoran Power Ltd.*; in the United States District for the Southern District of Texas, Houston Division. *See* App. F. The Court of Appeals order dismissing Petitioners' appeal from the second order of remand for lack of jurisdiction is also unpublished. *See* App. E.

STATEMENT OF JURISDICTION

The first order of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on June 1, 2004. A petition for rehearing *en banc* was timely filed. The petition was denied on October 18, 2004. *See* App. D. Petitioners' petition for writ of certiorari was originally due on January 18, 2005. On January 11, 2005, Justice Scalia granted petitioners' application for extension of time to file the petition of certiorari until March 2, 2005 so that a single petition could be filed in the two related cases.

The second order of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on November 10, 2004. *See* App. E. A petition for rehearing was timely filed on November 24, 2004, and was denied on January 7, 2005. *See* App. G.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

The Petitioners have been unsuccessful in their attempts to stay or recall the mandate. As a result, the state trial court has scheduled a trial for May 23, 2005.

STATUTORY PROVISIONS INVOLVED

Congress ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention") in 1970. December 29, 1970, Art. II, para. 1, 21 U.S.T. 2517, 330 U.N.T.S. 38. Congress implemented the Convention at 9 U.S.C. §§ 201-08 (the "Convention Act"). Section 205 of the Convention Act, at issue here, provides for removal of actions where the subject matter "relates to an arbitration or agreement falling under the Convention." 9 U.S.C. § 205.

Section 205 and the statute providing for the general procedure after removal (28 U.S.C. § 1447(d)) are reproduced in the appendices to this petition (*see* App. H).

STATEMENT OF THE CASE

This action arises out of a dispute over the distribution of a $90 million international arbitral award (the "Final Award") that is subject to the Convention.[1]

Crystal Power Company ("Crystal"), a Bahamian company, sued four defendants. Defendants/Petitioners Coastal Salvadoran and Coastal Nejapa are Cayman Islands companies. Crystal also sued Defendants/Petitioners El Paso CGP Company and El Paso Corporation, both as successors in interest to Coastal States Gas Corporation and The Coastal Corporation. The suit attacks the Final Award and the process that produced it. It also seeks proceeds due under a contract entered into pursuant to the terms of the Final Award. The basis for removal jurisdiction in the federal court is 9 U.S.C. § 205.

I. Dispute Between Nejapa Power and CEL Over the Power Project Is Resolved By Arbitration

In 1994, El Salvador decided to proceed with the country's first private power generation project. Comision Ejecutiva Hidroelectrica del Rio Lempa ("CEL"), an autonomous institution of the government of El Salvador, accepted bids for the project, which was eventually (through various assignments not relevant here) awarded to Nejapa

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1. The text of the Convention is reprinted in the notes under § 201 of Chapter 2 of the Federal Arbitration Act, 9 U.S.C.A. § 201.

Power Company, L.L.C. ("Nejapa Power"). Crystal and Coastal Salvadoran own Coastal Nejapa, which is majority owner of Nejapa Power, which owns the power plant. CEL entered into a 20-year Power Purchase Agreement ("PPA") with Nejapa Power. The PPA provided for construction of the power plant and the sale of power by Nejapa Power to CEL. The PPA contained an arbitration clause.

In 1999, CEL filed an arbitration action under the Arbitration Rules of the United Nations Commission on International Trade Law seeking the termination of the PPA without payment of compensation to Nejapa Power. CEL claimed that due to unforeseeable circumstances, the PPA had become excessively onerous. The arbitration was conducted in Geneva, Switzerland. On March 21, 2002, the Panel issued its Final Award. The Panel allowed CEL to terminate the PPA provided that CEL: (1) pay Nejapa Power $90 million USD as indemnification for the PPA's premature termination, and (2) execute a new contract with Nejapa Power, a Transmission Costs Agreement, by which CEL was to be responsible for and to pay Nejapa Power annually certain monies for five years. CEL elected to terminate the PPA, to pay the $90 million, and to execute the Transmission Costs Agreement.

II. Crystal Seeks Award Proceeds

In its original petition filed in Texas state district court, and then as clarified in its later petitions, Crystal complains that it did not receive its fair share of the Final Award's corpus, that it is not receiving other payments, including payments being made pursuant to the Transmission Costs Agreement, and that Petitioners mishandled the international arbitration proceeding. Crystal also claims that Petitioners'

conduct amounted to a fraudulent tax evasion scheme perpetuated against the Salvadoran and United States governments. Crystal's pleaded causes of action include conversion, breach of fiduciary duty, breach of contract, breach of the duty of good faith and fair dealing, misrepresentation, shareholder oppression, and fraud.

III. Petitioners Remove, District Court Remands, and Fifth Circuit Refuses to Review the First Remand Order

Petitioners removed this case under 9 U.S.C. § 205 (providing for removal of actions that "relate to" an arbitration agreement or award falling under the Convention).[2] An agreement or award falls under the Convention if it arises "out of a legal relationship, whether contractual or not, which is considered as commercial," and the relationship is not entirely between citizens of the United States. 9 U.S.C. § 202. Although expressly finding the Final Award "was one subject to the Convention," and that the Final Award and the distribution of funds payable under the Award may be evidence in Crystal's state court suit (App. B), the district court nonetheless granted Crystal's motion for remand, reasoning that Crystal's lawsuit did "not involve potential recognition and enforcement of any arbitral clause, agreement, or award." App. B.

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2. Section 205's "relates to" criteria has been construed broadly, as long as the agreement or award falling under the Convention can conceivably affect the outcome of the plaintiff's case, the agreement or award "relates to" the plaintiff's action. *See Bautista v. Star Cruises*, No. 03-15884 , 2005 WL 90949 at *1, __ F.3d __ (11th Cir. 2005); *Beiser v. Weyler*, 284 F.3d 665, 674 (5th Cir. 2002) ("relates to" jurisdiction under Section 205 should be construed "liberally" because "easy removal is exactly what Congress intended in § 205").

Petitioners immediately filed a motion for reconsideration with the district court accompanied by a motion to compel arbitration based on the arbitration provision in the Transmission Costs Agreement.[3] The district court granted the motion for reconsideration, vacated the remand order, and reinstated the case, finding that remand would "be futile because the case now clearly would be removable under the Convention." App. C. The district court reasoned that "[w]ith Defendants' new filings, it is evident that ***the subject matter of the action*** if remanded to state court ***would now relate to the demand for an arbitration under the Convention to determine Plaintiff's claim to a portion of a previous arbitral award.***" *Id.* (emphasis added). However, Crystal subsequently convinced the district court that it lacked jurisdiction to vacate the remand order and reinstate the case and the district court vacated its order reinstating the case.

In their appellants' brief in the appeal from the first remand order, Petitioners argued that the district court erred because it had allowed an attack on an international arbitration award issued under the Convention to proceed without federal court involvement. Specifically, they argued that the district court's requirement that a claim involve "potential recognition and enforcement of an arbitral clause, agreement or award" is nowhere to be found in § 205's language and instead was an invented limitation that could not withstand scrutiny under established statutory

3. Petitioners also filed a notice of appeal of the remand order. Despite the fact that the district court granted the motion for reconsideration and reinstated the case, Petitioners did not abandon their appeal. Indeed, Petitioners later amended their notice of appeal to include an appeal from the district court's order vacating its reinstatement order.

construction rules. They also argued that the district court failed to apply the "low bar" applicable to removal jurisdiction as set forth in its prior opinion in *Beiser*, 284 F.3d at 669, and which has since been followed by the Eleventh Circuit. *Bautista*, __ F.3d at __. The Fifth Circuit did not reach these merits arguments.

On June 1, 2004, in a one-sentence order, the Fifth Circuit dismissed Petitioners' appeal for lack of jurisdiction, and on October 18, 2004, the Fifth Circuit denied the petition for rehearing *en banc*, treating it as a request for panel rehearing. App. A.

IV. Petitioners' Second Removal, the Second Remand and Dismissal of Appeal

Hours after the hearing at which the district court announced that it would vacate the order reinstating the case, but before the district court entered its order vacating the reinstatement order, Crystal filed an amended petition in state court, attempting to sanitize its pleading of all references to the Final Award or the international arbitral proceeding. However, because Crystal continued to seek proceeds related to the Final Award and the Transmission Costs Agreement, which had been entered into pursuant to the Final Award, and because the Transmission Costs Agreement contains an arbitration provision, Petitioners removed the cause a second time.[4] In addition to asserting that the action "related to" an arbitration award falling under the Convention, Petitioners alleged that the cause "related to" an arbitration agreement falling under the Convention based upon the arbitration agreement in the Transmission Costs Agreement. This was

4. The case was eventually assigned to the same district judge that handled the first removal.

the same basis for jurisdiction asserted by Petitioners in their motion for reconsideration of the first remand order. Simultaneously, Petitioners filed a motion to compel arbitration which was incorporated by reference into the notice of removal.

Even though the district court had previously indicated that a motion to compel arbitration made it "evident that the subject matter of the action ... would now relate to the demand for arbitration under the Convention", on August 18, 2004, the district court granted Crystal's motion to remand.[5] App. C. The district court identified three reasons for the remand: (1) the "Notice of Removal itself does not contain an allegation that 'an arbitration clause falling under the Convention provides a defense' to Crystal's claim against them"; (2) "the arbitration agreements (incorporated into the Notice of Removal) do not, on their face, provide any defense to Crystal's claims"; and (3) "Crystal's claims are not dependent upon any issues that are subject to the agreements containing the arbitration provisions." App. F.

The Fifth Circuit stayed the second remand order on Petitioners' request. In their appellants' brief challenging the second remand order, Petitioners argued that the order was reviewable because: (1) it was based on a non-§ 1447(c) ground; and (2) if it applies, § 1447(d) should not be interpreted to foreclose review of remand orders entered in causes removed under the Convention. Petitioners contended that for reasons of international comity, the domestic considerations that animate the unreviewability of remand orders must yield. Petitioners also argued that the order was

5. The district court determined that the first remand did not foreclose Petitioners from removing the case on a different basis.

reviewable under the collateral order doctrine. As to the merits, Petitioners complained that the district court erroneously: (1) conflated a merits inquiry (whether Petitioners could enforce the arbitration agreement) with a jurisdictional inquiry (whether Crystal's action "relates to" an agreement falling under the Convention); (2) placed an onerous and erroneous pleading burden on Petitioners and then wrongly resolved doubts against Petitioners; and (3) misconstrued § 205's "relate to" criteria by requiring that Petitioners prove that an arbitration agreement is a defense to the plaintiff's action when the word "defense" is nowhere in § 205. Petitioners also pointed out that the district court's second remand conflicted with its reinstatement order, where the court had stated that § 205's "relates to" criteria is satisfied if there is "potential for enforcement" of an arbitration agreement "under the Convention." Again, the Fifth Circuit did not reach these merits-arguments.

On November 10, 2004, the day after Petitioners' appellants' brief was filed, in a *per curiam* order, the Fifth Circuit granted Crystal's motion to dismiss the appeal and to lift the stay. App. E. The Fifth Circuit's brief order cites to *Dahiya v. Talmidge Int'l, Ltd.*, 371 F.3d 207 (5th Cir.) *reh'g denied*, 380 F.3d 218 (5th Cir. 2004), *cert. denied*, 543 U.S. _ (2005), a case which is inapposite because the district court there had found that the arbitration agreement did not fall under the Convention. On January 7, 2005, the Fifth Circuit denied Petitioners' petition for rehearing *en banc*. App. G.

REASONS FOR GRANTING THE PETITION

The ever-increasing use of arbitration to resolve international commercial disputes reflects the success of the Convention, which was passed to facilitate the arbitral process in international contexts. As international arbitrations multiply, so too does litigation that relates to the broad array of rights afforded under the Convention Act. The question presented is whether § 1447(d) will frustrate the important policy goals of the Convention and the Convention Act by wrongly imposing the vastly different policy reasons that prevent review of remand orders in domestic contexts on remand orders entered in Convention cases. (The district court found that the Final Award and the arbitration provision at issue fall under the Convention.) Stated differently, the question posed by this petition is whether a district court may determine whether an action "relates to" an award or agreement falling under the Convention with no review of that determination afforded.

This petition for writ of certiorari should be granted because the Fifth Circuit's refusal to review the district court's orders remanding a cause that was removed pursuant to 9 U.S.C. § 205 contravenes the Convention and the nation's treaty obligations thereunder and is premised on an erroneous construction of § 205. Section § 1447(d) does not apply, or if it does, should not be construed in a manner that frustrates the fundamentally important goals of the later adopted Convention Act.

This Court previously recognized that the Convention's purpose is to unify standards by which international

arbitration agreements are enforced, which are achieved in part by channeling those cases to federal court:

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, this Court again emphasized the importance of the federal policy favoring international arbitration when it held that:

> [C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

473 U.S. 614, 629 (1985).

As this Court recognized, the emphatic federal policy in favor of arbitral dispute resolution "applies with special force in the field of international commerce." *Id.* at 631.

Thus, behind the strong federal policy of support for international arbitration as a dispute resolution system is Congress' recognition that in order for international commerce to thrive, there must be a system which creates predictability and uniformity in the marketplace. Both of these underlying goals were undermined by the Fifth Circuit's improper reliance on 28 U.S.C. § 1447(d) as rendering a remand order of a cause removed under § 205, where the district court determined that the arbitration award and arbitration agreement fell within the Convention, impervious to review. That untenable breach of comity deserves review.

Even if this Court were to conclude that § 1447(d) is an absolute bar to reviewability, and there are forceful reasons against that conclusion, here both orders were reviewable under the collateral order doctrine and the second order should have been reviewable on the additional basis that the district court remanded the cause based on a non-§ 1447(c) ground.

I. The Fifth Circuit Incorrectly Applied § 1447(d) to Deny Review of Remand Orders in a Convention Case, Effectively Vitiating an Important Treaty

A. The Fifth Circuit's Orders Conflict With This Court's Longstanding Commitment to the Convention

This Court has twice held that well-established bars must give way in deference to the policies underlying the Convention. In *Mitsubishi Motors*, this Court held that the Convention required abandonment of a bar to the arbitrability of Sherman Act claims. *Mitsubishi Motors*, 473 U.S. at 639 n.21. In *Scherk*, this Court held that an international

arbitration agreement would be enforced notwithstanding language in the Securities Act to the contrary:

> [T]he delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements.

417 U.S. at 520 n.15. In *Mitsubishi Motors* and *Scherk*, the "parochial views" involved questions of substantive law and whether claims made under those laws were arbitrable. In both cases, this Court determined that, despite "parochial views" to the contrary in domestic contexts, claims made under those substantive laws were arbitrable in Convention-related cases. *See also Bautista*, __ F.3d at __ (because Congress gave the "treaty-implementing" Convention statute "primacy", the Convention "must be enforced according to its terms over all prior inconsistent rules of law") (internal citations omitted). The requested result here is much less intrusive. It is simply that § 1447(d) does not foreclose review of remand orders of cases removed under § 205. Without such a result, defendants in Convention-related cases are subject to the "parochial view" that because of § 1447(d), procedural (not substantive) law that pre-dates the adoption of the Convention, they are not entitled to a federal forum for resolution of their Convention-related cases.

Following this Court's directive, both the Fifth and Eleventh Circuits recently held that the FAA's exemption of seaman employment contracts does not apply to arbitration

agreements covered by the Convention. *Bautista*, __ F.3d at __; *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 338-39 (5th Cir. 2004). These cases represent yet another example of a bar that exists in a domestic context giving way to the primacy of the Nation's treaty commitment.

Section 1447(d)'s prohibition of review of remand orders in the domestic context should not be allowed to thwart the powerful policy goals animating the enforcement of international arbitration agreements and awards under the Convention and the Convention Act. 9 U.S.C. §§ 201-08. The reasons for curtailing a jurisdictional debate that is achieved by allegiance to § 1447(d) must yield to the more important policy of facilitating predictability and uniformity in Convention cases that is achieved by routing Convention cases to our federal courts. Like the two prior bars this Court held to be ineffective in a case governed by the Convention, this Court should now find the bar to review of remand orders to be ineffective in Convention cases.

B. The Fifth Circuit Dismissals Violated Statutory Construction Rules in Interpreting § 205

The Fifth Circuit's first order of dismissal (App. A) contains no reasoning; the second order cites only to *Dahiya* (App. E). In *Dahiya*, the Fifth Circuit reasoned that § 205's provision that "the procedure for removal of causes otherwise provided by law shall apply" means that the "strictures of § 1447(d)" apply. *Dahiya*, 371 F.3d at 209. The Fifth Circuit's analysis violates settled statutory construction rules.

The first step in interpreting a statute is to determine whether the statutory language has a plain and unambiguous meaning. "[T]he language itself, the specific context in which

that language is used, and the broader context of the statute as a whole" guide this determination. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The inquiry ceases if the language is clear and "the statutory scheme is coherent and consistent." *Id.* at 340 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)).

The Fifth Circuit interpreted § 205's phrase "the procedure for removal of causes otherwise provided by law shall apply" to be an express incorporation of 28 U.S.C. § 1447 into § 205. *Dahiya*, 371 F.3d at 209. The clear and unambiguous language of that provision demonstrates that such an interpretation is incorrect. Moreover, the Fifth Circuit's reasoning runs contrary to long standing statutory construction rule *expressio unius exclusio alterius* (the expression of one thing is the exclusion of another). *See generally Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80-81 (2002).

"The procedure for removal" language in 9 U.S.C. § 205 is clear and unambiguous and refers to 28 U.S.C. § 1446, not § 1447 or any other statute in Chapter 89. The words "procedure for removal" in § 205 are clear and unambiguous. It is a direct reference to § 1446, which is entitled "Procedure for removal" and which is the foundation for the well-pleaded complaint rule. Conversely, § 1447 is entitled "Procedure after removal generally." This Court has previously noted the distinction between § 1446, which governs "procedure ***for*** removal" and § 1447, which governs procedure that occurs ***after*** removal should the non-removing party request that the case be returned to state court. *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 342 (1976); *see also Wisconsin Dept. of Corr. v. Schacht*, 524 U.S. 381, 392 (1998) ("[1447] deals, not with the question

of what is removable, but with the procedures that a federal court is to follow ***after*** removal occurs") (emphasis added).

Therefore, the clear and unambiguous language of § 205 reflects Congress' intent to incorporate certain aspects of § 1446 into § 205; not, as the Fifth Circuit held, to incorporate all of § 1447 into § 205. Moreover, had Congress intended to incorporate § 1447 into § 205, rather than use the phrase "procedure for removal" it could have referred to procedures for "removal of cases from state courts" which is the heading of Chapter 89 which includes §§ 1441-52. Finally, "procedure for removal" and "procedure after removal" are concepts that typically go hand in hand. That "procedure for removal" was included in § 205 and "procedure after removal" was excluded further compels the holding that Congress did not intend for § 1447 to apply to § 205 removals. *Echazabal*, 536 U.S. at 81.

A contextual reading of "procedure for removal" also establishes that § 205 is referring to § 1446 and not § 1447. Additionally, a reading of § 205 as a whole demonstrates that Congress enacted the statute to make it easy to remove cases related to international arbitration agreements and awards. Congress accomplished this by creating a number of exceptions to standard removal procedures. More specifically, the statute is designed to free removing parties in cases related to international arbitration agreements and awards from certain requirements in 28 U.S.C. § 1446.

For example, § 205 allows the grounds for removal to be shown on the face of the complaint ***or*** the face of the petition for removal. This is a clear exception to the well-pleaded complaint rule, which relates to the operation of

§ 1446.[6] The other major difference in removal procedure codified in § 205 is the timing requirement – the action may be removed at any time before trial – which also alters removal procedure embodied in § 1446. The Fifth Circuit in *Dahiya* considered none of these contextual aids and in a mere sentence concluded that "procedure for removal" is an express incorporation of § 1447(d).[7]

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6. With this in mind, the exception to the well-pleaded complaint rule written into § 205 makes perfect sense because, in Convention – related matters, the balancing of the separation of powers at the heart of the development of the well-pleaded complaint rule is inapplicable. In Convention-related cases, the balance of power is decidedly shifted to favor federal over state interests.

7. In *Dahiya*, the Fifth Circuit relied on three cases for the proposition that § 205 incorporates § 1447(d). 371 F.3d at 209. None of those cases conducted a statutory construction analysis. Moreover, those cases are distinguishable on other grounds. In *LaFarge Coppee v. Venezolana de Cementos S.A.C.A.*, 31 F.3d 70 (2d Cir. 1994), the district court remanded because of a procedural defect in removal. Specifically, the defendant had not removed "prior to trial" as mandated by the express language of § 205 because the state court had already conducted the injunction hearing and the complainant only sought injunctive relief. *Id.* at 71-73. In *Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619 (8th Cir. 1997), the district court specifically cited 28 U.S.C. § 1447(c) as the basis for its remand order. *Id.* at 624 ("[T]he district court cited 28 U.S.C. § 1447(c) in its order granting . . . remand"). The same is not true here. Finally, in *In re Amoco Petroleum Additives Co.*, 964 F.2d 706 (7th Cir. 1992), the defendants did not initially remove under § 205 and instead attempted to add § 205 as an alternate basis for removal at a later date. *Id.* at 711. When the defendants removed again, this time without all of the other defendants, the district court again remanded for a defect in removal procedure. *Id.* at 711-12.

This Court denied a petition for writ of certiorari in *Dahiya* on January 7, 2005. *Dahiya* is not dispositive of this petition because

(Cont'd)

The Fifth Circuit's construction of § 205 is inconsistent with the significant implications of the exception to the well-pleaded complaint rule that Congress expressly wrote into § 205. By creating an exception to the well-pleaded complaint rule, Congress placed removing parties on identical footing with the party who brought the action. Either party may invoke federal court jurisdiction by reference to the facts as ***that party*** alleges. The implications of the exception are pronounced. Most importantly, it signifies a congressional intent to treat a decision of whether allegations in a removal petition give rise to federal jurisdiction the same way that decision would have been treated if that party had brought the action in federal court originally.[8] In cases removed under § 205, a district court's decision that the grounds stated in the petition for removal fail to establish federal subject matter jurisdiction is the procedural equivalent of a dismissal under Federal Rule of Civil Procedure 12(b)(1) and is thus entitled to review, notwithstanding § 1447(d).

(Cont'd)

the district court in the present case found an award and an agreement that were covered by the Convention, where in *Dahiya*, the district court found that the arbitration agreement did not qualify as an arbitration agreement under the Convention. *Dahiya*, 371 F.3d at 209.

8. This result is consistent with the entire statutory scheme of the Convention-implementing legislation. If this were not so, it would be an acknowledgement that, after expressly making it easy to channel all Convention-related cases into federal court, Congress had, nevertheless, left in place the powerful bias toward the plaintiff's choice of forum provided in our domestic laws and made the determination of whether a federal appellate court reviews Convention-related cases based, in part, on who filed first. Such a result makes little sense.

The origins of the well-pleaded complaint rule prove this point. *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for So. Cal.*, 463 U.S. 1 (1983), provides an analysis of this Court's longstanding interpretation of the current statutory scheme of removal. Writing for a unanimous Court, Justice Brennan stated that in non-diversity cases "the propriety of removal turns on whether the case falls within the original 'federal question' jurisdiction of the United States district courts: 'The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.'" *Id.* at 8 (quoting 28 U.S.C. § 1331). The Court then noted that the statutory phrase "arising under the Constitution, laws, or treaties of the United States" had "resisted all attempts to frame a single, precise definition" and "mask[ed] a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." *Id.*

The Court concluded by acknowledging that

> [o]ne powerful doctrine has emerged, however—the well-pleaded complaint rule—which as a practical matter severely limits the number of cases in which state law creates the cause of action that may be initiated in or removed to federal district court, thereby avoiding more-or-less automatically a number of potentially serious federal-state conflicts.

Id. at 9-10 (internal quotes omitted).

By granting, in § 205, the removing party the right to invoke federal question jurisdiction itself based upon matters that would otherwise be raised only defensively, it necessarily

follows that a district court's determination that the petition for removal fails to state a basis for federal court jurisdiction is equivalent to a dismissal.

The well-pleaded complaint rule, its origins, and its extraction from § 205 removals confirms that the scope of removals authorized under § 205 is far greater than other removals. It makes little sense for Congress to have made it far easier to remove in a § 205 case, but then presume that Congress intended to insulate a remand order in § 205 from any review.

Plainly put, the Fifth Circuit's assumption that the procedures applicable ***after*** removal apply in a cause removed under § 205 is not grounded in the statute, and is at odds with the statutory scheme and language of § 205.

C. The Fifth Circuit's Refusal to Review the Remand Orders in a Convention Case Impermissibly Frustrates the Goals of the Convention

The Fifth Circuit lumped Petitioners' Convention-based removal in with other removals, failing to appreciate the profound differences between ordinary removals and those that occur in Convention cases. As discussed above, removals under § 205 are fundamentally different from removals under 28 U.S.C. § 1441, *et seq.* in that the period for removal is greatly extended and the long-established well-pleaded complaint rule does not apply. 9 U.S.C. § 205; 28 U.S.C. § 1446.

It is also noteworthy that although Chapter 1 of the FAA (9 U.S.C. §§ 1-16) manifests favored status accorded to arbitration, which implements the Convention, Chapter 2

extends that favored treatment even further. 9 U.S.C. § 208 (the Convention Act residual statute which makes clear that the Convention Act takes precedence over the FAA). For example, a case cannot be filed or removed to federal court on the basis that Chapter 1 applies unless the filing or removing party can demonstrate diversity or federal question jurisdiction. In contrast, a case can be filed or removed on the sole basis that it is governed by the Convention. 9 U.S.C. §§ 203, 205. Furthermore, a party moving to confirm an award governed by Chapter 1 has one year to do so, but a party moving to confirm an award governed by the Convention has three years to do so. 9 U.S.C. §§ 9, 207. A prerequisite to confirmation under Section 9 is the parties' consent to judgment on the award, which is not a prerequisite under the Convention Act, Chapter 2 of the FAA. *Id.*; *see also Phoenix Aktiengesellschaft v. Ecoplas, Inc.*, 391 F.3d 433, 436 (2d Cir. 2004). Plainly put, while arbitration agreements governed by Chapter 1 enjoy favored status, that favored status is further heightened under the Convention. That special and favored status should militate against insulating a remand decision from review.

D. Policy Goals of § 1447(d) Have No Application Here

Strong policy reasons compel the determination that parochial domestic views on the non-appealability of remand orders should be trumped by Convention-related considerations. The policy of § 1447(d) is to avoid interruption of the litigation of the merits of a case by prolonging the dispute over questions of jurisdiction. *United States v. Rice*, 327 U.S. 742, 751 (1946). In this regard, § 1447(d) complements § 1446(b), which requires prompt removal of cases, typically at the beginning of the dispute.

The clear language of § 205 demonstrates that this policy is of no consequence in Convention-related cases because § 205 allows a defendant to remove a case "at any time before trial." Obviously, by authorizing removals through the eve of trial, Congress is not concerned with interruption but is instead concerned with safeguarding the right to a federal forum. As such, the strong policy of channeling Convention-related cases into federal court, fueled by comity concerns, overrides any policy concerns embodied in § 1447(d), which is based upon the less important goals of efficiency and economy. Indeed, § 205 represents the antithesis of § 1447(d) because it expressly allows for the prolonging of the case in order to ensure that the dispute is decided by the proper court.

II. Additionally, the District Court's Second Remand Order Is Reviewable Because it Was Predicated on a Non-1447(c) Ground[9]

The district court rejected the merits of Petitioners' claim that Crystal's action relates to an award and then to an agreement falling under the Convention, first finding that the Final Award's connection to the case was too remote to satisfy the "relates to" criteria, and second, finding that because Petitioners were not signatories to the arbitration agreement in the Transmission Costs Agreement, Petitioners could not claim that the agreement provided it with a defense to Crystal's claims. The district court thus conflated the merits with its jurisdiction determination, violating this Court's longstanding rule that whether a federal court has jurisdiction to decide an issue is a distinct question from how to decide that issue correctly. *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913); *see also Steel Co. v. Citizens for a Better*

9. This issue was not raised in *Dahiya.*

Env't, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional ***power*** to adjudicate the case") (emphasis in original); *Bell v. Hood*, 327 U.S. 678, 682 (1946). Nonetheless, while the district court should not have made the merits decision to decide jurisdiction, the fact that it did so twice removes this case from the reach of § 1447(d)'s prohibition on review of remand orders.

Specifically, § 1447(d) does not apply where the district court clearly and affirmatively states a non-§ 1447(c) ground for remand. *Thermtron Prods., Inc.*, 423 U.S. at 351; *In re Adm'rs of the Tulane Educ. Fund*, 954 F.2d 266, 269 (5th Cir. 1992); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1210-11 (3d Cir. 1991). That is the situation here and it is made clear by contrasting an earlier Fifth Circuit decision, *Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406 (5th Cir. 1991). In *Soley*, the issue was the applicability of § 1447(d) to a remand order based on a rejection of the removing party's claim that the state law claims were completely preempted by federal law, in that case, ERISA. *Soley*, 923 F.2d at 408. In addition to arguing the applicability of the collateral order doctrine, the defendant argued that because the district court had remanded based upon a non-§ 1447(c) ground, review was not foreclosed by § 1447(d). *Id.* In resolving the question of whether the district court's remand order rejecting the defendant's preemption argument was a non-§ 1447(c) ground, *Soley* looked to the "helpful distinction" between "complete preemption" which is a jurisdictional inquiry and the "preemption defense" which

is a substantive inquiry. *Id.* at 408-09 (citing *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989)). *Soley* noted

> [t]he jurisdictional question concerning "complete preemption" centers on whether it was the intent of Congress to make the cause of action a federal cause of action and removable despite the fact that the plaintiff's complaint identifies only state claims. The latter inquiry, concerning a "preemption defense," is a substantive inquiry as to whether a legal defense exists. This would be a matter for trial by a court having jurisdiction.

Soley, 923 F.2d at 408-09. *Soley* noted that the remand order was "confusing" and "ambiguous" as to whether the decision was based on the rejection of the complete preemption doctrine or on a decision as to the defendant's preemption defense, but ultimately held it could not review the remand order. *Id.* at 409; *see also id.* at 410 (explaining that "if the district court considered the preemption defense, it did so only because of an erroneous belief that the defense was relevant to the jurisdictional issue.").

Here, there is no such confusion or ambiguity. First, Petitioners are not invoking the complete preemption doctrine, which operates as an exception to the well-pleaded complaint rule. Indeed, the well-pleaded complaint rule is explicitly abrogated in § 205 because the grounds for federal jurisdiction can be alleged in the removal notice. Instead, Petitioners asserted removal jurisdiction based, in part, upon the fact that the subject matter of the case related to an arbitration agreement falling under the Convention. As stated in Petitioners' removal notice, the agreement could conceivably affect the outcome of the case because, in

Petitioners' view, the agreement would require Crystal's claims to be arbitrated. Accordingly, it is undisputed that, unlike *Soley*, where there may have been some confusion as to whether the district court went beyond the jurisdictional question in its remand order, here the district court's remand order can only be interpreted one way—as based upon the district court's substantive determination that Petitioners' Convention-related defenses lacked merit.

That the district court's remand order is based on a non-§ 1447(c) ground is proved by numerous cases which hold that a district court cannot make a merits determination to decide the propriety of the removal. *See Thermtron*, 423 U.S. at 352; *In re Adm'rs of the Tulane Educ. Fund*, 954 F.2d at 269; *Foster*, 933 F.2d at 1210-11. In short, by exceeding the bounds of the jurisdictional inquiry allowed and finding Petitioners' defenses unmeritorious, the district court here necessarily based its decision on a substantive issue rather than a jurisdictional issue.

Because the district court's remand order was based on a decision that the arbitration agreement did not provide a defense, in part because Petitioners are not signatories to the agreement containing the arbitration clause, the remand order was based on a non-§ 1447(c) ground and the Fifth Circuit had jurisdiction to review the order.

III. The Remand Orders Are Reviewable Under the Collateral Order Doctrine

The Fifth Circuit's refusal to review the remand orders also conflicts with *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), and *City of Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140 (1934), providing review

of a pre-remand decision made by a district court if that decision is "separable" from the remand order and independently reviewable. To come within the *City of Waco* line of cases, the pre-remand decision must have preceded the remand order "in logic and in fact" such that the decision was "made by the District Court while it had control of the cause." *Waco*, 293 U.S. at 143. The decision must be "conclusive," or functionally unreviewable in the state court. *Id.* (while a remand order cannot be reviewed on appeal, certain separable orders that (1) logically precede the remand and (2) are conclusive, in the sense of being functionally unreviewable in state courts can be reviewed provided the order is independently reviewable by means of devices like the collateral order doctrine). An appealable collateral order is an order that conclusively resolves an issue separate from the merits of the controversy, is effectively unreviewable on appeal from final judgment and is too important to be denied review. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996).

In the present case, the district court's "separable" rulings that precede the remand orders in logic and in fact satisfy the first requirement. The separable rulings are three: (1) the Final Award and arbitration agreement do not provide a defense to Crystal's claims; (2) non-signatories cannot enforce an arbitration agreement; and (3) Crystal's claims are not dependent upon any issues that are subject to the agreement containing the arbitration provision. The district court ruling that the arbitration agreement does not provide a defense to Petitioners is a separable ruling premised on the district court's conclusion that, as non-parties to the agreement containing the arbitration clause, it was not conceivable that the arbitration clause could affect the outcome of Crystal's state court action. The district court's

ruling, which preceded the remand in logic and in fact, also has powerful relevance beyond determining jurisdiction in that it cut Petitioners off from their right to have a federal forum determine whether an arbitrator would resolve their dispute, in contravention of this Court's decisions holding that Convention cases should be channeled to federal court.

CONCLUSION

The district court first found that the arbitration award upon which Petitioners premised their removal fell within the Convention. It then found that the arbitration agreement upon which Petitioners premised their second removal also fell within the Convention. Yet, on each occasion, the district court determined it did not have jurisdiction. Section 1447(d), which has great utility and strong policies in the domestic context, should not be permitted to frustrate § 205, a statute enacted to implement treaty obligations. A decision that it does is inconsistent with this Court's prior holdings. Petitioners requests that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JUNE 1, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-21232

CRYSTAL POWER COMPANY

Plaintiff - Appellee

v.

COASTAL SALVADORAN POWER LTD; COASTAL NEJAPA LTD; EL PASO CGP COMPANY, successor in interest to Coastal States as Corporation and The Coastal Corporation; EL PASO CORPORATION, successor in interest to Coastal States Gas Corporation and The Coastal Corporation

Defendants - Appellants

Appeals from the United States District Court for the Southern District of Texas, Houston

Before HIGGINBOTHAM, DAVIS, and PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the motion of appellee to dismiss appeals is granted.

s/ [illegible]

APPENDIX B — MEMORANDUM AND ORDER AND ORDER OF REMAND OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION BOTH DATED NOVEMBER 10, 2003 AND BOTH FILED NOVEMBER 13, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-03-3634

CRYSTAL POWER COMPANY,

Plaintiff,

vs.

COASTAL SALVADORAN POWER, LTD., COASTAL NEJAPA, LTD., EL PASO GCP COMPANY, successor in interest to Coastal States Gas Corporation, and The Coastal Corporation, and EL PASO CORPORATION, successor in interest to Coastal States Gas Corporation and The Coastal Corporation,

Defendants.

MEMORANDUM AND ORDER

Pending is Plaintiff Crystal Power Company's ("Crystal") Motion for Remand (Document No. 4). After carefully considering the motion, response, reply, and applicable law, the Court finds that Plaintiff's Motion for Remand should be granted.

Appendix B

I. *Background*

This action arises out of a dispute over the distribution of a $90 million arbitral award. In 1994 the Nejapa Power Company ("NPC"), which operates a power project in El Salvador, entered into a Power Purchase Agreement ("PPA") with Comisión Ejecutiva Hidroeléctrica Del Rio Lempa ("CEL"), an autonomous institution of El Salvador. Though the PPA was to last until 2015, CEL terminated it in 1999. Subsequent arbitration of the "termination indemnity proceeding" resulted in an arbitral award of $90 million to NPC.

Crystal and each Defendant directly or indirectly hold varying degrees of ownership interests in NPC. Crystal, maintaining that it neither participated in nor approved of the arbitration, alleges that all Defendants wrongfully deprived it of a share in the $90 million award, in violation of prior agreements among the parties. In addition, Crystal suggests that Defendants' conduct amounted to a fraudulent tax evasion scheme perpetrated against the El Salvadoran and United States governments.

Alleging a host of state law claims, Crystal sued Defendants in the 23rd Judicial District Court of Brazoria County, Texas. Defendants removed the case to this Court on the grounds that the state court action related to an arbitration award governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), and therefore fell within the removal

provision of 9 U.S.C. § 205.[1] Crystal now moves for remand, arguing that § 205 does not apply and that Defendants previously waived any right to remove the case to federal court.

II. *Discussion*

The party removing a case to federal court has the burden of proving federal jurisdiction. *Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.*, 99 F.3d 746, 751 (5th Cir. 1996). In their Notice of Removal (Document No. 1) Defendants rely solely on 9 U.S.C. § 205 as the basis for removal. Plaintiff Crystal disputes that § 205 applies, and argues that even if § 205 does apply Defendants have waived their right to remove.

Title 9 U.S.C. § 205 governs removal under the Convention:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in

1. The case was removed to the Galveston Division of this Court, and the Honorable Samuel B. Kent *sua sponte* then transferred the case to the Houston Division.

> this section need not appear on the face of the complaint but may be shown in the petition for removal. For purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

An arbitration agreement or arbitral award falls under the Convention when it arises out of a "legal relationship, whether contractual or not, which is considered as commercial," and such relationship is "not entirely between citizens of the United States. . . ." 9 U.S.C. § 202. For purposes of § 202, a corporation is a citizen of the United States if it is incorporated there or has its principal place of business there. *See id.* Thus, the arbitral award between CEL (an autonomous institution of El Salvador and not a United States citizen) and NPC concerning the termination of a commercial power purchase agreement, was one subject to the Convention. *See* Document No. 7 ex. A, at 2.

"[W]henever an arbitration agreement falling under the Convention could *conceivably* affect the outcome of the plaintiff's case, the agreement 'relates to' the plaintiff's suit" within the meaning of § 205. *Beiser v. Weyler*, 284 F.3d 665, 669 (5th Cir. 2002). Jurisdiction under § 205 will follow in "just about any suit in which a defendant contends that an arbitration clause falling under the Convention provides a defense. As long as the defendant's assertion is not completely absurd or impossible, it is at least conceivable that the arbitration clause will impact the disposition of the case." *Id.* Defendants compare their case to *Beiser*, claiming that the arbitration award here constitutes a defense to Crystal's claims just as the arbitration clause in *Beiser* constituted a defense.

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In *Beiser* the Fifth Circuit treated the scope of "relates to" in § 205 as analogous to the "broad scope" given by the Supreme Court to ERISA's preemption of any state law that "relates to" an employee benefit plan. *See id.* at 669 (citing *Shaw v. Delta Air Lines, Inc.*, 103 S. Ct. 2890 (1983)). However, the Supreme Court has also acknowledged limits to the scope of ERISA preemption: "We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term ["relates to"], and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995). Similarly, the objective of the Convention Act, 9 U.S.C. §§ 201-208, serves as a guide to when an action or proceeding in state court no longer "relates to" an arbitration clause or arbitral award within the meaning of § 205.

The objective of the Convention Act is the *enforcement* of the Convention on the *Recognition* and *Enforcement* of Foreign Arbitral Awards in the United States:

> Congress ratified the Convention . . . to secure for United States citizens predictable *enforcement* by foreign governments of certain arbitral contracts and awards made in this and other signatory nations. . . . To gain rights under the Convention, though, Congress had to guarantee *enforcement* of arbitral contracts and awards made pursuant to the Convention in United States courts. . . . So Congress promulgated the Convention Act in 1970 to establish procedures for our

courts to implement the Convention. 9 U.S.C. § 201, *et. seq.*

McDermott Int'l, Inc. v. Lloyds Underwriters of London, 944 F.2d 1199 (5th Cir. 1991) (emphasis added). Indeed, § 206 of the Convention Act empowers a court to order arbitration in accordance with an arbitration agreement, and § 207 permits a court to confirm an arbitral award upon application by a party to the arbitration. *See* 9 U.S.C. §§ 206, 207.

The situation in *Beiser* fell within the scope of the Convention Act's enforcement objective. Beiser, director and sole employee of a corporation, signed on its behalf agreements that contained arbitration clauses falling under the Convention. *See Beiser*, 284 F.3d at 667. Later Beiser, acting solely on behalf of himself, brought state law tort claims against various parties to the agreements. *See id.* When the defendants removed under § 205, Beiser sought to remand, arguing that the arbitration clauses were not "related to" his case because he signed the agreements as a corporate agent rather than an individual. *See id*. The Fifth Circuit disagreed, stating that corporate personhood was not an absolute shield, that the arbitration clauses could conceivably affect the outcome of Beiser's case, and that his state court proceeding therefore "related to" an arbitration agreement within the meaning of § 205. *See id.* at 669-670. The arbitration clause "could conceivably affect" the outcome of Beiser's case, of course, because compelled arbitration would be possible if Beiser were held bound to the arbitration clause. The *potential* in that case *for enforcement* of the arbitration clause was the reason that it could "conceivably affect" the outcome of the case and why the case itself was therefore "related to" an arbitration agreement within the meaning of 9 U.S.C. § 205.

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The instant case, unlike *Beiser*, does not involve potential recognition and enforcement of any arbitral clause, agreement, or award. Defendants appear not to dispute that the arbitration agreement between NPC and CEL, neither of which as such is a party to this case, was fully performed, the arbitration was completed, the arbitral cash award of $90 million was rendered, and CEL paid the cash award. *See* Document No. 7. Neither Plaintiff nor Defendants seek either to compel an arbitration or to obtain recognition and enforcement of an arbitral award. Thus, the NPC/CEL award here does not constitute a defense in the same sense that the arbitration clause constituted a defense in *Beiser*, where the arbitration clause had the potential to require an arbitration of the dispute raised in the lawsuit. Here, the arbitration, arbitral award, and payment of that award are all history. Plaintiff's allegation is that the $90 million cash award should have been paid to Defendant Coastal Nejapa, Ltd., from which Plaintiff would have received its share, but instead, Defendant El Paso Corporation caused the proceeds to be directed to another entity and thereby deprived Plaintiff of its share. Evidence of the arbitral award and its prior payment may therefore be admissible in the dispute that has now arisen between the parties to this case, which all had interests in NPC, but that evidence in the context of the dispute here does not implicate the Convention, or the Convention Act. In other words, the connection of the NPC/CEL arbitral award to this case is "too tenuous, remote, or peripheral" to find that this case "relates to" an award under § 205. *Cf. Shaw*, 103 S. Ct. at 2901 n.21 (noting that the connection of some state laws to employee benefit plans is too remote for the laws to "relate to" the plans for purposes of ERISA preemption).

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As the subject matter of the removed state court proceeding does not "relate to" an arbitral award within the meaning of 9 U.S.C. § 205, Defendants have not carried their burden of proving federal jurisdiction and the case must be remanded.[2]

III. *Order*

For the foregoing reasons, it is

ORDERED that Plaintiff Crystal Power Company's Motion for Remand (Document No. 4) is GRANTED, and this case is REMANDED to the 23rd Judicial District Court of Brazoria County, Texas.

The Clerk will mail a certified copy of this Order to the Clerk of the 23rd Judicial District Court of Brazoria County, Texas, as required by 28 U.S.C. § 1447, and shall notify all parties and provide them with a signed copy of this Order.

SIGNED at Houston, Texas, on this 10th day of November, 2003.

s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

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2. The Court therefore need not address Plaintiff's alternative argument that Defendants waived any right to removal.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-03-3634

CRYSTAL POWER COMPANY,

Plaintiff,

vs.

COASTAL SALVADORAN POWER, LTD., COASTAL NEJAPA, LTD., EL PASO GCP COMPANY, successor in interest to Coastal States Gas Corporation, and The Coastal Corporation, and EL PASO CORPORATION, successor in interest to Coastal States Gas Corporation and The Coastal Corporation,

Defendants.

ORDER OF REMAND

For the reasons stated in the separate Memorandum and Order signed this day, it is

ORDERED that this case is REMANDED to the 23rd Judicial District Court of Brazoria County, Texas.

The Clerk will mail a certified copy of this Order to the Clerk of the 23rd Judicial District Court of Brazoria County, Texas, as required by 28 U.S.C. § 1447, and shall notify all parties and provide them with a signed copy of this Order.

SIGNED at Houston, Texas, on this 10th day of November, 2003.

s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED DECEMBER 29, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-03-3634

CRYSTAL POWER COMPANY,

Plaintiff,

COASTAL SALVADORAN POWER LTD., COASTAL NEJAPA LTD., EL PASO CGP COMPANY, Successor in Interest to Coastal States Gas Corporation, and The Coastal Corporation, and EL PASO CORPORATION, Successor in Interest to Coastal States Gas Corporation and The Coastal Corporation,

Defendants.

ORDER

After the Court ordered the remand of this case to the 23rd Judicial District Court of Brazoria County, Texas, by Order entered November 13, 2003, Defendants Coastal Salvadoran Power Ltd., Coastal Nejapa Ltd., El Paso CGP Company, and El Paso Corporation ("Defendants") filed a Motion to Compel Arbitration (Document No. 19) and, contemporaneously, Moved to Reconsider the Remand Order in Light of Defendants' Motion to Compel Arbitration (Document No. 18).

Appendix C

When the Court remands a case for lack of jurisdiction, it ordinarily has no authority to reconsider or modify that Order and no appeal may be taken therefrom. The Fifth Circuit has held that a remand order where jurisdiction is asserted under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, however, is subject to appellate review. *Beiser v. Weyler*, 284 F.3d 665, 674 (5th Cir. 2002). The trial court, therefore, has authority to review its own Order. *See In Re Digicon Marine, Inc.*, 966 F.2d 158, 161 (5th Cir. 1992) ("(W]here remand is reviewed on appeal `a district court has jurisdiction to review its own order, and vacate or reinstate that order."' quoting *In Re Shell Oil Co.*, 932 F.2d 1523, 1528 (5th Cir. 1991)).

Defendants' motion for reconsideration was filed within ten days after entry of the challenged Order. Accordingly, it will be considered as a Rule 59(e) motion. *Fletcher v. Apfel*, 210 F.3d 510, 511 (5th Cir. 2000) (noting that a motion for reconsideration that is filed within ten days after entry of a judgment, is considered a Rule 59(e) motion).

Defendants have now filed a motion to compel arbitration with respect to Plaintiff's claimed entitlement to a percentage of an arbitral award. Moreover, Defendants have now disclosed a representation that they made in this case to the Honorable Sam Kent at a scheduling conference held last September that they intended to file a motion to compel arbitration. At the time of the remand Order, a motion to compel arbitration had not been filed and Defendants still offer no explanation as to why not. Nonetheless, the prior representation to Judge Kent tends to refute an inference of manipulation that might otherwise be drawn from

Defendants' present motion. With Defendants' new filings, it is evident that the subject matter of the action if remanded to state court would now relate to the demand for an arbitration under the Convention to determine Plaintiff's claim to a portion of a previous arbitral award. Defendants would be entitled to remove this action to the District Court of the United States pursuant to 9 U.S.C. § 205. Under these circumstances, remand would be futile because the case now clearly would be removable under the Convention. For the foregoing reasons, it is

ORDERED that the Memorandum and Order (Document No. 17) and Order of Remand (Document No. 16) both entered November 13, 2003, are VACATED and SET ASIDE, and this case is REINSTATED. It is further

ORDERED that the Order for Conference and Disclosure of Interested Parties filed September 10, 2003, is REINSTATED, including the setting for an initial pretrial and scheduling conference on Friday, February 27, 2004, at 2:15 p.m.

The Clerk shall mail a certified copy of this Order to the Clerk of the 23rd Judicial District Court of Brazoria County, Texas, and shall notify all parties and provide them with a signed copy of this Order.

SIGNED at Houston, Texas, on this 22d day of December, 2003.

s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED OCTOBER 18, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-21232

CRYSTAL POWER COMPANY

Plaintiff - Appellee

v.

COASTAL SALVADORAN POWER LTD; COASTAL NEJAPA LTD; EL PASO CGP COMPANY, successor in interest to Coastal States as Corporation and The Coastal Corporation; EL PASO CORPORATION, successor in interest to Coastal States Gas Corporation and The Coastal Corporation

Defendants - Appellants

Appeals from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

Before HICGINBOTHAM, DAVIS and PRADO, Circuit Judges.

Appendix D

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED.R.APP.P. and 5th CIR.R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ PEH/dl
United States Circuit Judge

Judges Garwood and Clement did not participate in the consideration of the petition for rehearing en banc.

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED NOVEMBER 10, 2004

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 04-20678

CRYSTAL POWER CO.,

Plaintiff-Appellee,

versus

COASTAL SALVADORAN POWER LTD; COASTAL NEJAPA LTD; EL PASO CGP CO, successor in interest to Coastal States Gas Corporation and The Coastal Corporation; EL PASO CORP, as successor in interest to Coastal States Gas Corporation and The Coastal Corporation,

Defendant-Appellants.

Appeal from the United States District Court for the Southern District of Texas, Houston

Before JOLLY, BARKSDALE and PICKERING, Circuit Judges.

PER CURIAM:

Before the Court is appellee's motion to lift the stay and appellee's motion to dismiss for lack of jurisdiction. The Court has denied a petition for rehearing en banc in *Dahiya*

v. Talmidge Int'l, 371 F.3d 207 (5th Cir. 2004). Furthermore, the mandate has issued in *Crystal Power v. Coastal Salvadoran* (No. 03-21232). Thus, there is no longer any reason to maintain the stay in this case.

IT IS ORDERED that appellee's motion to lift the stay is GRANTED.

IT IS FURTHER ORDERED that the appellee's motion to dismiss the appeal is

GRANTED.

APPENDIX F — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED AUGUST 18, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-04-1250

CRYSTAL POWER COMPANY,

Plaintiff,

v.

COASTAL SALVADORAN POWER LTD., COASTAL NEJAPA, LTD., EL PASO CGP COMPANY, successor in interest to Coastal States Corporation and the Coastal Corporation, and EL PASO CORPORATION, successor in interest to Coastal States Gas Corporation and the Coastal Corporation,

Defendants.

MEMORANDUM AND ORDER

Pending is Defendants' Motion to Compel Arbitration (Document No. 3), Plaintiff's Motion for Remand (Document No. 9), and Defendants' Motion to Stay Pending Fifth Circuit Appeal and Related Arbitration (Document No. 18). Having considered the motions, responses and additional briefing, the history of Civil Action No. H-03-3634, and the applicable

law, the Court Orders, for the reasons set forth below, that Plaintiff's Motion for Remand (Document No. 9) is GRANTED and this case is REMANDED to the 23rd District Court of Brazoria County, Texas.

I. Procedural History

On October 15, 2002, Plaintiff Crystal Power Company ("Crystal") filed suit against Coastal Salvadoran Power, Ltd. and Coastal Nejapa, Ltd. in the 23rd District Court of Brazoria County, Texas, Cause No. 21815*BH02. In its Original Petition, Crystal alleged that it was an investor in a Salvadoran power plant, that Crystal had not "received proper and timely payments consistent with its financial interests in the venture" and that Defendants had diverted "a substantial prepayment of amounts ultimately due to the venture in excess of $100,000,000.00." Plaintiff's Original Petition, attached as Exhibit "3B" to Defendants' Notice of Removal (Document No. 1), at 3. Crystal alleged claims for breach of contract, conversion, breach of fiduciary duty, breach of the duty of good faith and fair dealing, misrepresentation, and fraud, and alternative theories of recovery based on "the doctrines of promissory estoppel and/or *quantum meruit*." *Id.* Crystal amended its petition on November 6, 2002, generally alleging the same facts but adding El Paso CGP Company (as successor in interest to Coastal States Gas Corporation and the Coastal Corporation), and El Paso Corporation (as successor in interest to Coastal States Gas Corporation and the Coastal Corporation) as Defendants. Plaintiff's First Amended Petition, attached as Exhibit "3B" to Defendants' Notice of Removal (Document No. 1). After filing a Second Amended Petition in April, 2003,

which also generally alleged the same facts and claims against the four Defendants, Crystal filed a Third Amended Petition on June 6, 2003. The Third Amended Petition alleged the following, particularized facts in support of Crystal's claims against Defendants:[1]

> In 1994, the Republic of El Salvador began to privatize power generation in the country. [Crystal] used its well-established reputation and credibility with the El Salvadoran government-run electric company, Comision Ejecutiva Hidroelectrica Del Rio Lempa ("CEL"), to convince the government to allow some of the Defendants to build a power plant in El Salvador and sell power. [Crystal] entered into a joint venture with Defendant, Coastal Salvadoran Power, Ltd., a company owned and controlled by the other Defendants, El Paso CGP and El Paso Corporation. (collectively, "El Paso"), to form Coastal Nejapa, Ltd. Defendant, Coastal Nejapa, Ltd., was to receive all the net earnings from the power project, with a minority percentage being paid to [Crystal] and the majority percentage going to Defendant, Coastal Salvadoran Power, Ltd., each in their respective ownership percentages. In 2008, [Crystal's] percentage in the venture was to more than double to approximately 29%, entitling [Crystal] to receive a greater share of the

1. Defendants, as used herein, refers to the same four Defendants named in the state court action: Coastal Salvadoran Power, Ltd., Coastal Nejapa, Ltd., El Paso CGP Company, and El Paso Corporation.

power project's profits. Through the direct efforts of [Crystal], the power project and CEL entered into a Power Purchase Agreement ("PPA"), dated May 18, 1994, that extends through the year 2015.

Defendants, El Paso, also has ownership and control of several entities from which the power project receives its working capital, oil and gas to run the plant, and management and technology personnel to head the day-today operations of the plant. All of these El Paso-owned entities receive their monies first from the power project before any monies were paid to Defendant, Coastal Nejapa, Ltd., whereupon other El Paso Defendants receive their majority share and [Crystal] a minority share of the available funds. In essence, Defendants, El Paso, double dip into the power projects' earnings while [Crystal] receives a reduced share of the profits rightfully owed to [Crystal].

In these Enron-like transactions, Defendants El Paso have stripped away the future income of the power project to meet their own current cash needs without regard to the best interest of the power project or its El Salvadoran partner. These Enron-like transactions effectively cashed-in and virtually eliminated the most valuable assets from the power project, specifically, the guarantee of future income and an assurance of solvency. Through this shell game, El Paso favored its own

subsidiaries over the interest of [Crystal] without regard to the validity of its actions under applicable law.

As a result of [Crystal's] ownership interest, it was entitled to certain payments relative to the operation of this project. Some or all of the Defendants exercise control over the income and/or cash flow of the project and have a responsibility to ensure that [Crystal] receives the proper and timely payment of amounts consistent with its financial interest in the project.

In 1999, CEL triggered a one-time provision in the PPA which allowed a possible prepayment of amounts due in the future at a substantial discount. Defendants were in sole control of the negotiations and subsequent arbitration of this termination indemnity proceeding. The power project and CEL entered into a lengthy arbitration to which [Crystal] was never a party nor approved. In spite of the present value of the PPA being worth hundreds of millions of dollars, some of the Defendants agreed to a significantly reduced price in order to get immediate cash out of the PPA and forego higher future earnings where [Crystal] would have owned a substantially greater share. When the agreement was reached between Defendants and CEL, the amount paid under the arbitration award ($90, 000, 000 USD) should have been paid to Coastal Nejapa, Ltd., from which [Crystal] would have received its share.

Instead, at Defendant El Paso's instruction, all proceeds were paid to another wholly owned subsidiary of El Paso, and then the funds were distributed upstream to other El Paso entities. Neither the project nor [Crystal] received one dollar of this payment.

Defendants have refused to honor certain agreements between the parties, including, but not limited to, the Shareholders Agreement of Coastal Nejapa, Ltd., as amended, and the Subscription Agreement, as amended. [Crystal] has not received proper and timely payments consistent with its financial interests in the venture. Instead, Defendants involved in the arbitration directed that the substantial prepayment of the power purchase agreement be paid directly to one of Defendants, El Paso's, entities (a non-party to the PPA between the power project and CEL), thereby never triggering the financial responsibilities and funding obligations to [Crystal].

Significantly, this substantial payment to Defendants would be taxable under El Salvadoran laws if the payment would have been distributed properly to the power project as owed. However, since Defendants diverted the funds to its other entities, the Defendants have never paid local income taxes on this substantial multi-million dollar payment. Defendant[']s deliberate tax aversion scheme not only cheated [Crystal] but the El Salvador government. Furthermore, based

> on information and belief, Defendants El Paso, which are corporations registered in Delaware and qualified to do business in Texas, have engaged in possible tax fraud as it has also never paid taxes to the United States government for the income earned from [the] substantial prepayment of the PPA.

Plaintiff's Third Amended Petition, attached as Exhibit "3B" to Defendants' Notice of Removal (Document No. 1), at 2-5.

Defendants then removed the case to this Court pursuant to 9 U.S.C. § 205. Crystal timely moved to remand the case, Civil Action No. H-03-3634, which motion was granted by Order entered November 13, 2003. In the Memorandum and Order granting Crystal's Motion to Remand, the Court concluded that "the subject matter of removed state court proceeding does not 'relate to' an arbitral award within the meaning of 9 U.S.C. § 205." *See* Document No. 17 in Civil Action No. H-03-3634 at 8.[2]

Thereafter, Crystal filed a Fourth Amended Petition in state court. That Fourth Amended Petition deleted the particularized facts set forth in the Third Amended Petition, and reverted to the more general allegations of the Second Amended Complaint that "[Crystal] has not received proper

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2. Defendants filed a Motion to Reconsider the Order granting Plaintiff's Motion for Remand. The Court initially (and erroneously) granted that motion, but later corrected its action by vacating and setting aside the Order granting reconsideration. Hence, that vacated Order is a nullity in Civil Action No. 03-3634 and has no effect or bearing upon the present case.

and timely payments consistent with its financial interests in the venture." Plaintiff's Fourth Amended Petition, attached as Exhibit "3B" to Defendants' Notice of Removal (Document No. 1), at 3. No mention was made in the Fourth Amended Petition of an arbitration proceeding or monies received as part of-an arbitral award.

On February 10, 2004, Defendants again removed the case to this Court pursuant to 9 U.S.C. § 205.[3] In the Notice of Removal, Defendants alleged that "the subject matter of the state court action relates to an international arbitration agreement or, alternatively, an international arbitration award." Notice of Removal (Document No. 1) at 1. Defendants additionally alleged:

> . . . . The Fourth Amended Petition deleted the language in Crystal's Third Amended Petition specifying that a significant, if not complete, portion of its requested relief was its alleged entitlement to a portion of an international arbitration award. *Id.* Crystal also deleted reference to possible violations of tax laws. *Id.*
>
> 3. Despite its attempts to plead around the issues, the fact remains that an international arbitration award and an international arbitration agreement are at the heart of Crystal's Fourth Amended Petition. Specifically, Crystal claims that as owner

3. As was the case with the first removal, this case was removed to the United States District Court for Southern District of Texas, Galveston Division, and was thereafter transferred to the Houston Division, and assigned to the undersigned judge.

> of a percentage of the Salvadoran power plant, it was entitled to a commensurate percentage of the plant's net earnings. See Fourth Amended Petition at ¶ 5-7. This includes a claim to a percentage of the amounts awarded in the international arbitration proceeding between Nejapa and CEL (the award referred to herein as the "Final Award"). *Id. See* Final Award attached as Exhibit 2.
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> 4. Crystal's claims are within the scope of the contracts containing international arbitration agreements which must be enforced. Crystal seeks to share in the proceeds from and benefits of a Final Award in arbitration. The Final Award resolved a dispute over a contract containing an agreement to arbitrate all disputes arising thereunder. Moreover, a contract entered into pursuant to the order of the Arbitral Tribunal in the Final Award, and of which Crystal seeks the benefits, requires arbitration of any and all disputes arising thereunder or in connection therewith.

Notice of Removal (Document No. 1) at 3-4 (footnotes omitted). Crystal has filed a Motion for Remand (Document No. 9). Defendants have filed a Motion to Compel Arbitration (Document No. 3).

II. Discussion

As a threshold matter, the Court must determine whether it has jurisdiction over this case. *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1012-1013 (1998). In this regard, Crystal first argues that the Court's jurisdiction over this case is foreclosed by the prior removal and remand of Civil Action No. H-03-3634. Additionally and alternatively, Crystal argues that the subject matter of this case does not "relate to" an arbitration agreement or an arbitration award within the meaning of 9 U.S.C. § 205. Finally, Crystal argues that Defendants waived their right to remove this case by virtue of the forum selection clause contained in the parties' shareholders agreement.

Title 9 U.S.C. § 205, the jurisdictional basis for removal at issue in both the first and second removals, provides as follows:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. . . .

Appendix F

The subject matter of an action pending in State court relates to an arbitration agreement or award within the meaning of § 205 whenever an arbitration agreement or an arbitration award "could conceivably affect the outcome of the plaintiff's case." *Beiser v. Weyler*, 284 F.3d 665, 669 (5th Cir. 2002) (emphasis in original). This is a very low bar, whereby jurisdiction under § 205 will exist 'over just about any suit in which a defendant contends that an arbitration clause falling under the Convention provides a defense." *Id.*

A. Effect of Prior Removal and Remand

In *S.W.S. Erectors, Inc. v. Infax Inc.*, 72 F.3d 489, 492 (5th Cir. 1996), the Fifth Circuit set forth the general rules governing the successive removal of a case that has previously been remanded:

> As a general rule, once a case is remanded to state court, a defendant is precluded only from seeking a removal on the same ground. The prohibition against removal "*on the same ground*" does not concern the theory on which federal jurisdiction exists (i.e., federal question or diversity jurisdiction), but rather the pleading or event that made the case removable.

(emphasis in original) (citations and footnotes omitted). Key to the inquiry is whether the second removal is based on the same *factual* ground for removal alleged in the first removal. Where a second removal asserts the same factual basis for removal as the first removal, the Court's prior order of remand, to the extent it "expressly addresses the theory of

federal jurisdiction" has res judicata effect on the subsequent removal. *Id.* at 493. In contrast, where a second removal asserts a new factual basis for removal, "the new factual basis is not deemed adjudicated with the remand order and, therefore, is not barred by res judicata." *Id.*

Crystal argues that Defendants' second removal, whether it is construed as being premised on the more particularized allegations in the Third Amended Petition, or the more generalized allegations in the Fourth Amended Petition, is precluded by virtue of the Order of Remand in Civil Action No. H-03-3634. According to Crystal, because the Court has already determined that the subject matter of the state court action, as alleged in the Third Amended Petition, was not related to an arbitration award, and because Defendants could have asserted in their first notice of removal that the state court action related to an arbitration agreement, but did not, Defendants' second removal should be determined to be invalid.

In their first removal, Defendants alleged only that the state court action related to an arbitration award subject to removal under 9 U.S.C. § 205. In their second removal, Defendants now allege that the state court action relates to both an arbitration award and an arbitration agreement. Whether the state court action relates to an arbitration award has already been decided. *See* Memorandum and Order (Document No. 17) in Civil Action No. H-03-3634.[4] Under

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4. The determination that the state court action was not related to an arbitration award was based on the following:

> . . . . Here, the arbitration, arbitral award, and payment of the award are all history. Plaintiff's allegation is that

(Cont'd)

S.W.S. Erectors, that determination has res judicata effect and precludes Defendants' second removal of this action on the basis that the state court action relates to an arbitration award. *S.W.S. Erectors*, 72 F.3d at 493.

The alternate basis for removal, namely, that the state court action relates to an arbitration agreement, could have been asserted by Defendants in the first removal. The Fifth

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(Cont'd)

> the $90 million cash award should have been paid to Defendant Coastal Nejapa, Ltd., from which Plaintiff would have received its share, but instead, Defendant El Paso Corporation caused the proceeds to be directed to another entity and thereby deprived Plaintiff of its share. Evidence of the arbitral award and its prior payment may therefore be admissible in the dispute that has now arisen between the parties to this case, which all had interests in NPC [Nejapa Power Company]. But that evidence in the context of the dispute here does not implicate the Convention, or the Convention Act. In other words, the connection of the NPC/CEL arbitral award to this case is "too tenuous, remote, or peripheral" to find that this case "relates to" an award under § 205.

Memorandum and Order (Document No. 17) in Civil Action No. H-03-3634, at 7-8. Defendants appealed the Memorandum and Order to the Fifth Circuit, which dismissed the appeal on June 1, 2004 without comment. The dismissal of Defendants' appeal is in accord with the recent decision of *Dahiya v. Talmidge Int'l, Ltd.*, 371 F.3d 207 (5th Cir. 2004), *reh'g and reh'g en banc denied*, F.3d , 2004 WL 1663849 (5th Cir. July 27, 2004) (No. 02-31068), in which the Fifth Circuit determined that a district court's order remanding a case for lack of jurisdiction under 9 U.S.C. § 205 was not reviewable on appeal.

Circuit, however, has not specifically determined that a second removal is precluded if the factual basis supporting the second removal could have been, but was not, asserted in the first removal. *S.W.S. Erectors* may suggest that result, but does not so hold. Moreover, no appellate authority has been found that supports such an extension of *S.W.S. Erectors*. *But see Grover v. Comdial Corp.*, 275 F. Supp. 2d 750, 754 (W.D. Va. 2003) ("If nothing of significance changes between the defendant's first and second attempts to remove the case, the prior remand order is the law of the case."). Accordingly, Defendants' first removal, and the remand order in Civil Action No. H-03-3634, does not preclude Defendants' second removal, which includes different factual assertions--that is, that the state court action is related to an arbitration agreement.

B. "Related to" an Arbitration Agreement

Generally, courts should be able to "assess their jurisdiction from the pleadings alone." *Beiser*, 284 F.3d at 671. Under § 205, however, jurisdiction can also be determined from the notice of removal. According to the court in *Beiser*:

> The language of § 205 strongly suggests that Congress intended that district courts continue to be able to assess their jurisdiction from the pleadings alone. Section 205 provides in part: "The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint *but may be*

> *shown in the petition for removal*." 9 U.S.C. § 205 (emphasis added). This language does create one difference between the federal question jurisdiction conferred by § 205 and most other forms of federal question jurisdiction: it permits removal on the basis of a federal defense. The language that the ground for removal "need not appear on the face of the complaint" explicitly abrogates the well-pleaded complaint rule that normally keeps such defenses from serving as the basis for federal question jurisdiction. But at the same time the statute permits a defense based on an arbitration clause to serve as a grounds for removal, it also directs us to treat such defenses the same way that we treat offensive claims. That is, just as we determine whether a plaintiff's claim arises under federal law from the complaint alone, the statute directs us to determine whether a defendant's defense arises under federal law from the "petition for removal" alone.

Beiser, 284 F.3d at 671. Therefore, "absent the rare frivolous petition for removal, as long as the defendant claims in its petition [for removal] that an arbitration clause provides a defense, the district court will have jurisdiction to decide the merits of that claim." *Id.* at 671-72. Such a procedure "allows the district court to determine its jurisdiction from the petition for removal, without taking evidence and without a merits-like inquiry." *Id.* at 672.

Here, in their Notice of Removal, Defendants identify three agreements that contain arbitration provisions: (1) a

Appendix F

1994 Power Purchase Agreement ("PPA") between CEL and Nejapa Power Company, L.L.C. ("NPC"); (2) a March 2002 "Final Award," which reflected CEL's and NPC's agreed resolution of their dispute regarding the PPA; and (3) a Transmission Costs Agreement ("TCA"), entered into by CEL and NPC as part of the Final Arbitration Award. Defendants do not assert in their Notice of Removal that the arbitration provisions in any of those three agreements provide a defense to Crystal's claims. Instead, they assert that it is "'conceivable' that the arbitration agreement referenced in the Final Award and contained in the TCA could affect the outcome of this case." Notice of Removal (Document No. 1) at 8.

The party removing a case to federal court has the burden of proving federal jurisdiction, *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995); *Jernigan v. Ashland Oil Co.*, 989 F.2d 812, 815 (5th Cir.), *cert. denied*, 114 S. Ct. 192 (1993), with any uncertainty or ambiguities being resolved in favor of remand. *Manguno v. Prudential Property and Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002). Here, Defendants have not met their burden of establishing jurisdiction, even under the "low bar" permitted for removal of a case under § 205.

Defendants do not allege in the Notice of Removal that any of the three arbitration agreements they have identified provides them with a "defense" to Crystal's claims. Moreover, Defendants' Notice of Removal discloses that the three agreements to arbitrate were entered into by CEL and NPC, neither of which is a party to this case. *See* Notice of Removal (Document No. 1) at 2-4; *see also* PPA, Final Award,

and TCA, attached as Exhibits 1, 2, and 3 respectively, to Defendants' Notice of Removal (Document No. 1). The Notice of Removal likewise discloses that none of the parties to this case was a signatory of the agreements containing the arbitration provisions. *See* Exhibits 1, 2, and 3 to Defendants' Notice of Removal. Therefore, since Defendants are not signatories to the arbitration agreements, they cannot facially or credibly claim that the arbitration agreements provide them with a defense to Crystal's claims. *See Westmoreland v. Sadoux*, 299 F.3d 462, 465, 467 (5th Cir. 2002). Indeed, Defendants have made no such claim. Given that Defendants' Notice of Removal itself does not contain an allegation that "an arbitration clause falling under the Convention provides a defense" to Crystal's claim against them, *Beiser*, 284 F.3d at 669, and because the arbitration agreements (incorporated into the Notice of Removal) do not, on their face, provide any defense to Crystal's claims, Defendants' Notice of Removal on its face is inadequate to support jurisdiction under § 205.

Likewise, Crystal's state court pleadings contain no allegations to support jurisdiction under § 205. "[W]henever an arbitration agreement falling under the Convention could conceivably affect the outcome of the plaintiff's case, the agreement `relates to' the plaintiff's suit." *Beiser*, 284 F.3d at 670. Here, Crystal's claims are not dependent upon any issues that are subject to the agreements containing the arbitration provisions. Crystal's state court action, even when formerly pled in the Third Amended Petition with more particularized facts and a reference to the arbitration award, is simply based on allegations that Crystal has not received from Defendants-not from any party to the concluded

arbitration-the payments to which it is entitled under the parties' shareholders' agreement. The parties' shareholders' agreement does not contain an arbitration clause, and is separate and distinct from the PPA, the Final Award, and the TCA. It is therefore not "conceivable" that any arbitration clause contained in the PPA, the Final Award, or the TCA, could affect the outcome of Crystal's state court action on a completely different contract.

Because neither the allegations in Defendants' Notice of Removal nor the allegations in Crystal's state court pleadings support jurisdiction under § 205, Plaintiff's Motion for Remand must be granted.

III. Conclusion and Order

Based on the foregoing, it is

ORDERED that Plaintiff Crystal Power Company's Motion for Remand (Document No. 9) is GRANTED and this case is REMANDED to the 23rd District Court of Brazoria County, Texas.

The Clerk shall mail a certified copy of this Order to the Clerk of the 23rd Judicial District Court of Brazoria County, Texas, as required by 28 U.S.C. § 1447, and shall notify all parties and provide them with a signed copy of this Order.

SIGNED at Houston, Texas, this 18th of August, 2004.

s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED JANUARY 7, 2005

No. 04-20678

CRYSTAL POWER CO.

Plaintiff - Appellee

v.

COASTAL SALVADORAN POWER LTD.; COASTAL NEJAPA LTD.; EL PASO CGP CO., successor in interest to Coastal States Gas Corporation and The Coastal Corporation; EL PASO CORP., as successor in interest to Coastal States Gas Corporation and The Coastal Corporation

Defendants - Appellants

Appeal from the United States District Court for the Southern District of Texas, Houston

Before JOLLY and HIGGINBOTHAM, Circuit Judges.*

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is

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* Judge Pickering was a member of the original panel but retired from the Court on December 8, 2004 and, therefore, did not participate in this decision.

Appendix G

DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

s/ E. Grady Jolly
United States Circuit Judge

APPENDIX H — STATUTES INVOLVED

9 USCS § 205 (2004)

§ 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

Appendix H

28 USCS § 1447 (2004)

§ 1447. Procedure after removal generally

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(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

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